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Issue date: 28May2002

CASE NO.: 1993-BTD-00045

BRB No.: 00-0443 BLA

IN THE MATTER OF:

JAMES TYLER
Claimant

v.

PEABODY COAL COMPANY
Employer

and

OLD REPUBLIC INSURANCE COMPANY
Carrier

and

**DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS, UNITED
STATES DEPARTMENT OF LABOR**
Party-in-Interest

**DECISION AND ORDER ON THIRD REMAND -
ORDERING PAYMENT OF MEDICAL BENEFITS
- AND REMAND TO DIRECTOR**

Employer/Carrier (employer) appealed this Court's Supplemental Decision and Order on Second Remand issued December 16, 1999 ordering the payment of medical expenses on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901, **et seq.** (the Act). The Benefits Review Board affirmed this Court's decision in part and vacated in part and remanded the case for further consideration of issues as directed in the Board's Decision and Order issued January 18, 2001.

Claimant, James Tyler was previously awarded benefits under

the Act.¹ The instant dispute focuses upon whether employer should be required to reimburse the Black Lung Disability Trust Fund (Trust Fund) for payment of claimant's medical bills.

The procedural history of this medical benefits claim is detailed in the Board's decision (January 18, 2001). In their Decision and Order dated May 27, 1997 the Board affirmed Judge Rippey's finding that employer had failed to establish rebuttal of the Stiltner presumption. In their Decision and Order dated May 30, 1995, the Board noted that the United States Court of Appeals for the Fourth Circuit had held, in **Doris Coal Co. v. Director, OWCP [STILTNER]**, 938 F2d 492, (4th Cir. 1991), that when a miner receives treatment for a pulmonary disorder a presumption arises that the disorder was caused or at least aggravated by the miner's pneumoconiosis, making the employer liable for medical costs. Because no party objected to the application of the **Stiltner** presumption to the instant case, the Board found it unnecessary to rule on the application of Stiltner to cases arising outside the jurisdiction of the United States Court of Appeals for the Fourth Circuit. The Board noted that the instant case arose within the jurisdiction of the United States Court of Appeals for the Seventh Circuit.

In their Decision dated May 27, 1997 the Board agreed with employer that Judge Rippey's findings regarding employer's statute of limitations argument did not comport with the requirements of the Administrative Procedure Act (APA). The Board, therefore, vacated Judge Rippey's finding regarding the statute of limitations and remanded the case for further consideration. The Board further instructed Judge Rippey, on remand, to address employer's assertions that the Trust Fund's voluntary payment of claimant's medical expenses precluded recovery and that the payment of medical bills in amounts greater than \$100.00, in the absence of reports of first treatment, was barred.

Due to Judge Rippey's unavailability, this claim was reconsidered by the undersigned on remand. In this Court's Supplemental Decision and Order on Second Remand (December 16, 1999), I found that the statute of limitations did not bar the Trust Fund's recovery of claimant's medical expenses. I also found that the Trust Fund was not precluded from recovery because the Trust Fund made "voluntary payments" of claimant's medical bills.

¹Claimant's Social Security Administration (SSA) application and the SSA decision awarding benefits are not found in the record. The record indicates only that claimant was ultimately awarded Part B benefits. See Director's Exhibit 1.

This court further found that the Trust Fund was not barred from recovery of claimant's medical expenses because employer was not provided reports of claimant's first treatment. This court also rejected employer's arguments that bills in amounts greater than \$100.00 were not reimbursable.

In its Decision and Order January 18, 2001, the Board noted it affirmed, in its 1997 Decision and Order, Judge Rippey's reliance upon the Fourth Circuit's **Stiltner** presumption to establish recovery of medical benefits by the Trust Fund. However, the Board noted subsequent to the issuance of Judge Rippey's October 26, 1995 Decision and Order and the Board's May 27, 1997 Decision and Order, the Fourth Circuit issued the **Ling** decision.² The Board further states because it is unclear whether all means of rebutting the **Stiltner** presumption have been fully considered, the Board remands the case to me with instructions to reconsider whether the evidence is sufficient to establish rebuttal of the **Stiltner** presumption.

The Board affirmed this court's finding that the statute of limitations does not bar the Trust Fund's recovery of the payment of claimant's medical benefits in the instant case.

Employer contended this court misunderstood its argument that it was prejudiced by the Department of Labor's failure to comply with its regulations and notify employer of the claim before the Trust Fund paid the bills. Employer contended that because the Department of Labor's actions deprived it of due process, it must be dismissed from the case. Director agreed with employer this court "misconstrued the issue" by merely noting that employer retained the right to challenge the medical bills in question. The Board thereupon ruled that "Inasmuch as the parties agree that the administrative law judge misconstrued the issue before him, the administrative law judge, on remand, is instructed to address whether the Department of Labor's failure to timely inform employer

²The Sixth Circuit rejected the **Stiltner** presumption which it found inconsistent with the remedial purposes of the Act. See **Glen Coal Co. v. Seals**, 147 F3d 502 (6th Cir. 1998). However, the Fourth Circuit subsequently affirmed the validity of the **Stiltner** presumption in **Gulf & Western Industries v. Ling**, 176 F3d 226 (4th Cir. March 19, 1999). The Fourth Circuit, in **Ling**, rejected the contention that the **Stiltner** presumption improperly shifted the burden of proof in medical benefit cases from the claimant to the party opposing the claim. The Fourth Circuit also rejected the contention that the **Stiltner** presumption was contrary to the Supreme Court's decision in **Director, OWCP v. Greenwich Collieries [ONDECKO]**, 512 U.S. 267 (1994).

of claimant's medical bills denied employer its right to due process."

Employer contended and the Board agreed this court erred in finding that it was in the interest of justice to excuse the failure of the treating physicians or facilities to provide employer with reports of claimant's first treatment. Consequently, the Board ruled on remand, should this court find that claimant is entitled to reimbursement of a physician's charges but that the required reports of first treatment were not filed, the case must be remanded to the district director to determine if such a failure should be excused under the terms of Section 907(d)(2) of the Longshore Act and Section 725.706(a) of the regulations.

In final argument employer contended that the medical bills in amounts greater than \$100.00 are not reimbursable pursuant to 20 C.F.R. § 725.705(b). The Director recognized and the Board agreed that this court failed to explain the rationale for finding that claimant "required emergency treatment" for his condition at each admission to the hospital. The Board held that this Court's analysis does not comport with the APA, specifically 5 U.S.C. § 557 (c)(3)(A), which provides that every adjudicatory decision must be accompanied by a statement of findings of fact and conclusions of law and the basis therefor on all material issues of fact, law or discretion presented in the record. 5 U.S.C. § 557(c)(3)(A), as incorporated into the Act by 5 U.S.C. § 554(c)(2), 33 U.S.C. § 919(d) and 30 U.S.C. § 932(a). Therefore, on remand, the Board directed this court must reconsider whether employer is responsible for the cost of claimant's hospitalizations in the instant case.

ISSUES

Thus the Board remanded the following issues for reconsideration by this Court:

I. Whether the evidence is sufficient to establish rebuttal of the **Stiltner** [Doris Coal] presumption as enunciated by the Fourth Circuit in **Gulf & Western Industries v. Ling, supra**.

II. Whether the Department of Labor's failure to timely inform employer of claimant's medical bills denied employer its right to due process and requires dismissal of employer as the responsible operator liable for claimant's medical expenses.

III. Whether employer is responsible for the cost of claimant's hospitalizations pursuant to the provisions of 20 C.F.R. § 725.705(b).

IV. Whether the case must be remanded to the district director to determine if failure to file report of first treatment should be excused under the terms of Section 33 U.S.C. § 907(d)(2); 20 C.F.R. § 702.422.

V. Employer's Motion to Dismiss or to Remand to the District Director, filed in this court on July 10, 2001.

APPLICABLE LAW AND REGULATIONS

The record shows the miner filed this claim for medical benefits on June 8, 1978. DX 2. The regulations setting forth procedures for obtaining medical benefits are set forth in 20 C.F.R. § 725 Subpart I. Claimant's eligibility for disability benefits under Part B and entitlement thereto was established at some time prior to filing his claim for medical benefits. See DX 1.

The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001 and are found at 20 C.F.R. Parts 718, 722, 725 and 726. All citations to the regulations in this decision refer to the old regulations unless otherwise noted.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed for duration of the lawsuit, all claims pending before the Office of Administrative Law Judges under the Act, except those in which the administrative law judge, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. **National Mining Ass'n v. Chao**, No. 1:00 CVF 03086 (DDC, Feb. 9, 2001) (Order granting preliminary injunction).

On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. **National Mining Ass'n v. Chao**, 160 F.Supp. 2d 47 (D.D.C. 2001). This court finds the District Court's Order upholding the validity of the challenged regulations and dissolving the preliminary injunction renders moot the issues disputed by the parties relating to the revision of the regulations.

The case law of the United States Court of Appeals for the Seventh Circuit, within whose jurisdiction this case arises, is applicable in this case.

MOTION TO DISMISS

On April 10, 2001 this court issued an Order directing the parties to submit a brief stating how application of the amended regulatory provisions will affect the outcome of this claim for medical benefits. The Director responded stating the revised regulations will not affect the outcome of this case. Employer's response to this Court's Order was found in its Motion to Dismiss or to Remand to the District Director. Director responded to employer's Motion and employer was allowed to file a reply brief. This court finds it must initially address the employer's motion to dismiss before considering the issues remanded by the Benefits Review Board.

MOTION TO DISMISS OR REMAND TO THE DISTRICT DIRECTOR

Employer's motion seeks "dismissal from this case no matter what set of regulations apply." Employer "objects to the retroactive application of the revised regulations to pending claims, like this one. Such retroactive application is prohibited." Citing **Bowen v. Georgetown Univ. Hosp.**, 488 U.S. 204(1988). See Motion at 1-2, Fn 1. If the court does not dismiss employer, it must remand this case to the district director, as instructed by the Benefits Review Board. Employer further stated the court may not decide this case because the new regulations governing medical benefits cases change the law and will affect this case. Employer asserts revised section 725.701(e) is not a codification of the **Doris Coal** presumption, as clarified by the Fourth Circuit in **LING** and **General Trucking Corp. v. Salyers**, 175 F3d 322, 324 (4th Cir. 1999). Employer finally asserts if the revised section 725.701 is upheld following the regulatory litigation, this court must reopen the record and allow employer an opportunity to respond to the change in law.

Director responds requesting that the court deny employer's Motion to Dismiss in all respects but comply with the Board's order to remand to the District Director.

In its response brief employer recognizes the issue of holding this case in abeyance is now moot in that Judge Sullivan dissolved the preliminary injunction. However the employer urges the court to reopen the record if the court adopts the Director's interpretation of revised Section 725.701. As discussed infra this Court finds revised Section 725.701 does not represent a change in

the law and there is no reason to reopen the record. This court also finds, as discussed below that the employer's motion to dismiss Peabody Coal in this case must be denied.

DISCUSSION

Presumption and Rebuttal under Stiltner

A

The Board remanded the case to this Court with instructions to reconsider whether the evidence is sufficient to establish rebuttal of the **Stiltner** presumption as reaffirmed by the Fourth Circuit decision in **Gulf & Western Industries v. Ling**, 176 F.3d 226 (4th Cir. 1999).

The Fourth Circuit established the **Stiltner** presumption by stating

Based on this broad definition [of pneumo] a miner meets his burden of showing that his medical expenses were necessary to treat pneumoconiosis if his treatment relates to any pulmonary condition resulting from or substantially aggravated by the miner's pneumoconiosis. Since most pulmonary disorders are going to be related or at least aggravated by the presence of pneumoconiosis, when a miner receives treatment for a pulmonary disorder, a presumption arises that the disorder was caused or at least aggravated by the miner's pneumoconiosis, making the employer liable for the medical costs. **Stiltner** at 496-97.

The **Stiltner** court held that the mine operator can only use subsequent proceedings to challenge the necessity of certain medical charges for the treatment of a pneumoconiosis related disorder or challenge medical charges not related to pneumoconiosis, but the operators may not require the miner to prove again that he has pneumoconiosis each time he makes a claim for health benefits.³

³**Stiltner** was receiving Part B benefits when he filed his Part C claim in 1979. Doris Coal and its carrier Old Republic Insurance Company agreed to pay the cost of black lung related health care costs that **Stiltner** had already incurred and would incur throughout his life.

The Fourth Circuit in **LING** reasoned that

"... in the great majority of cases, the disorders and symptoms associated with the miner's disability will closely correspond to those for which he later received treatment. Even where there is a less than perfect identity, however, the threshold creating the entitlement to benefits - that the pulmonary condition treated be merely aggravated by the miner's pneumoconiosis - is low enough to permit a rational conclusion that a particular respiratory infirmity will likely be covered... **LING** at 233.

... ..

Though the miner's burden of proving his claim is not onerous, it does not follow that it is non-existent or that it has somehow been shifted to the employer or its insurer. If the party opposing the claim produces credible evidence that the treatment rendered is for a pulmonary disorder apart from those previously associated with the miner's disability, or is beyond that necessary to effectively treat a covered disorder, or is not for a pulmonary disorder at all, the mere existence of a medical bill, without more, shall not carry the day. The burden of persuading the factfinder of the validity of the claim remains at all times with the miner. **Id.**

B

The record establishes the employer/carrier agreed to accept the United States Department of Labor's initial determination that the claimant James H. Tyler meets the standard of total disability under the Black Lung Benefits Act (30 U.S.C. § 901 et seq.). The employer further agreed to pay medical benefits and to reimburse the Black Lung Disability Trust Fund for any medical benefit payments made. The coal mine operator reserved the right to contest jurisdictional issues concerning validity of this claim for medical benefits only. See Director's Exhibit 20 executed by carrier on January 15, 1981.

In this case, employer in effect agreed with the Department of Labor that the miner's pneumoconiosis caused or at least aggravated Mr. Tyler's other respiratory disorders which the record shows included chronic obstructive pulmonary disease, chronic bronchitis, asthma and emphysema. Accordingly, Tyler has met his burden of proving that his pulmonary disorders clearly fall within the definitions of legal pneumoconiosis which "refers to all lung

diseases which meet the statutory or regulatory definition of being any lung disease which is significantly related to, or substantially aggravated by dust exposure in coal mine employment." Having agreed claimant suffered from disabling legal pneumoconiosis, employer cannot now prevail upon this court to find the miner's "intrinsic asthma" stands alone as the cause of all his disabling respiratory or pulmonary impairment as proclaimed by Drs. Paul and Branscomb in their medical reports.

C

Drs. Paul and Branscomb provide evidence which fails to defeat this miner's claim for medical benefits. Dr. Paul examined the claimant and concluded he had "intrinsic asthma which is an increased sensitivity of the patient's windpipes to nonspecific stimuli" Dr. Paul found claimant had no evidence of coal workers' pneumoconiosis. Dr. Branscomb agreed with Dr. Paul's diagnosis of claimant's asthma. While he referred to pneumoconiosis or coal workers' pneumoconiosis to include legal pneumoconiosis, Dr. Branscomb concluded none of the hospitalizations were reasonable or necessary for treatment of pneumoconiosis and none of the listed medications he reviewed "were reasonable or appropriate for the treatment of any pneumoconiosis which Mr. Tyler may have had" (Emphasis added). DX 30. Upon close study of Dr. Branscomb's entire review report I find he is reluctant to recognize that the claimant was totally disabled due at least in part to legal pneumoconiosis. Dr. Branscomb does not disclose he had been informed that employer agreed to accept Department of Labor's determination that the miner was totally disabled due to pneumoconiosis and met the standards of total disability under the Act. The record shows Drs. Paul and Branscomb were informed by Tyler that his asthma had been diagnosed in his 30's and obviously would be present at the time he filed his claim for medical benefits in June 1978. Thus the claimant's asthma recorded by Dr. Branscomb and Dr. Paul does not constitute a "pulmonary disorder apart from those previously associated with the miner's disability. Accordingly I find Dr. Branscomb's reliance upon asthma as a form of Chronic Obstructive Pulmonary Disease requires further explanation as the doctor does not clarify how the miner's disabling pneumoconiosis failed to have an impact upon the miner's alleged severe asthma. This court's finding Dr. Branscomb's diagnosis sufficient to rebut the presumption would amount to rejecting the credibility of the Department of Labor's initial determination that claimant Mr. Tyler meets the standards of total disability under the Act, which the employer had conceded and accepted. The court must find and does hereby find that Dr.

Branscomb's report does not provide sufficient evidence to rebut the **Stiltner** presumption.

Dr. Paul examined the claimant in September 1989 at carrier's request. He reported claimant suffered from "intrinsic asthma" along with numerous medical problems. DX 27. Dr. Paul concluded claimant "does not have any evidence of coal workers' pneumoconiosis." The doctor makes no reference to the hospitalizations and medications for treatment of claimant's pneumoconiosis. The doctor states he performed a "black lung evaluation on James Henry Tyler" which included physical examination, chest x-ray, pulmonary function studies and arterial blood gas studies, medical history, work history and reported claimant never smoked.

The court gives no weight to Dr. Paul's opinion as the existence of pneumoconiosis is not an issue in this claim for medical benefits only. Dr. Paul provides no assistance in this court's determination whether employer's evidence is sufficient to rebut the **Stiltner** presumption. As discussed *supra*, employer conceded claimant had established his disability was due to pneumoconiosis. The **Stiltner** court ruled "operators may not require the miner to prove again that he has pneumoconiosis each time he makes a claim for health benefits." **Stiltner**, 938 F.2d at 497. The regulations now include the **Stiltner** court's ruling

(f) Evidence that the miner does not have pneumoconiosis or is not totally disabled by pneumoconiosis arising out of coal mine employment is insufficient to defeat a request for coverage of any medical service or supply under this subpart....20 C.F.R. §725.701 (2001).

Since employer agreed to accept the Department of Labor's determination that the claimant did suffer from disabling coal workers' pneumoconiosis, employer's submission of evidence claimant did not have disabling pneumoconiosis has no validity at this stage of proceedings. Accordingly this court finds and concludes the evidence submitted by employer is not sufficient to establish rebuttal of the **Stiltner** presumption.

D

Whether Department of Labor's failure to timely inform employer of claimant's medical bills denied employer its right to due process.

Employer contends in its reply brief that its due process rights have been violated and asserts Department of Labor's failure

to provide employer with timely notice of medical expenses requires dismissal of Peabody as responsible operator. "In this case, Department of Labor's ten year delay in notifying employer of medical bills and Department of Labor's failure to comply with its regulations undermined employer's ability to submit its best defense at a meaningful time. This sort of fundamental due process violation compels dismissal of employer." Citing **Lane Hollow Coal Co. v. Director, OWCP**, 137 F.3d 799, at 807.08; (4th Cir. 1998); **Consolidation Coal Co. v. Borda**, 171 F.3d 175, at 183-84 (4th Cir. 1999) and **Island Creek Coal Co. v. Holdman**, 202 F.3d 173 at 883-84 (6th Cir. 2000). Employer's Reply Brief at 1-3.

Director contends Peabody's argument that its due process rights have been violated should be rejected. Director argues employer must show substantial prejudice in order to establish a denial of procedural due process. Citations omitted. Whether the Department of Labor paid the bills before Peabody knew about them has no bearing on whether Peabody had a meaningful opportunity to defend itself. Peabody had ample opportunity to develop evidence and availed itself of that opportunity. Director's Response to Employer's Motion to Dismiss at 2-3.

The requirement of due process is fully applicable to adjudicative proceedings conducted by administrative agencies. **Richardson v. Perales**, 402 U.S. 389, 401 91 S.Ct 1420, 1427, 28 LEd 2d 842 (1971). In Lane Hollow the Fourth Circuit concluded "The inexcusable delay in notifying Lane Hollow deprived it of the opportunity to mount a meaningful defense to the proposed deprivation of its property; consequently, it was denied due process of law." The Lane Hollow court also noted

....In this core due process context, we require a showing that the notice was received too late to provide a fair opportunity to mount a meaningful defense The due process clause does not create a right to win litigation; it creates a right not to lose without a fair opportunity to defend oneself Lane Hollow at 807.

Employer properly asserts it is not precluded from requesting dismissal as the responsible operator on due process grounds even if it has conceded that it meets the regulatory criteria for designation as the responsible operator. In citing **Lane Hollow**, **Borda** and **Holdman** suffice it to say these cases demonstrate due process violation based on particular supportive facts which do not appear in the instant case wherein special circumstances produced a unique body of facts for this court's consideration.

In the instant case the carrier/employer executed a written

agreement on January 15, 1981, inter alia, to reimburse the Trust Fund for any medical benefit payments made as it also agreed the miner met the standards of total disability due to pneumoconiosis under the Black Lung Benefits Act. DX 20. Employer complains and the record shows that not until 1989, for the first time, numerous bills for hospitalizations and treatment of the claimant during prior years were then presented to employer for reimbursement amounting to nearly \$50,000 in medical expenses (and nearly \$50,000 in interest).

Upon careful review of the record, this court finds that between 1981 and 1989 employer/carrier received no notification from claimant, his physician or from Department of Labor that claimant was hospitalized on several occasions and received medical treatment including multiple services and medications. The record discloses the reason for failure to inform employer of the miner's extended health treatment and services was "due to computer miscoding, no responsible operator identification was entered on our [DOL's] information system resulting in Trust Fund payment." (See Director's Exhibit 23, DOL letter dated July 19, 1989 to employer's attorney). Upon being notified of the clerical error employer engaged Dr. Paul who examined Mr. Tyler on September 27, 1989.

This court is not persuaded that the "computer miscoding" due to clerical error "deprived employer/carrier of the opportunity to mount a meaningful defense to the proposed deprivation of its property." Employer in this case received notice of claimant's medical treatment expenses at a time when the claimant and his providers were available for questioning. The court rejects employer's contention it was prejudiced by the Department of Labor's failure to notify employer of the claim before the Trust Fund paid the bills.

The Department of Labor's submission of notice while delayed until 1989 did not exclude employer's opportunity to mount a meaningful defense nor deny it's "right not to lose without a fair opportunity to defend itself." The employer had full opportunity to submit evidence challenging the medical claim for expenses and providing medical proof to exclude such medical expenses and bills as were not related to the miner's disabling coal workers' pneumoconiosis. The deficiencies I find in the employer's defense are the direct result of employer's own choice of mounting such defense in this case. The court finds the record demonstrates the Department of Labor did not deny employer its constitutional right to due process. The facts relating in this case relating to the delayed notices do not warrant dismissal of employer as the responsible operator liable for medical expenses of this claimant.

E

Authorization to provide Medical Services - 20 C.F.R. § 725.705(b)

Section 725.705(b) in pertinent part provides that:

Except where emergency treatment is required, prior approval of the Office or the responsible operator shall be obtained before any hospitalization or surgery, or before ordering an apparatus for treatment where the purchase price exceeds \$100.

Employer argues that the medical bills in amounts greater than \$100.00 are not reimbursable pursuant to Section 725.705. Employer asserts Tyler did not receive prior approval for medical services that were over \$100.00 contrary to the regulation. Employer stated the records show that Tyler's hospital expenses were not for any "acute emergency" care but were for the "management of a chronic condition." Employer lists the following eight hospitalizations as non-emergency medical care admissions which do not qualify for reimbursement:

May 1979	February 1986
April 1982	January 1987
June 1985	November 1987
June 1985	June 1988

EX 2, DX 30

This court's study of the hospitalization reports recorded for the years 1979 through 1988 in almost every admission contain a diagnosis of "acute bronchitis". Naming only a few, the June 26, 1985 - July 2, 1985 hospitalization reported "acute bronchitis, advanced chronic obstructive lung disease and coal workers' pneumoconiosis." The two 1987 admissions reported "COPD, acute bronchitis, exacerbated COPD." The June 1988 admission reported a diagnosis of acute bronchitis. DX 30.

Dr. Branscomb noted he believed two hospitalizations were for chest pain associated with a blood clot. The rest of the treatment was for asthma. Dr. Branscomb stated it was important to note that "the hospitalizations and treatments were invariably given for acute bronchitis (meaning sudden or abrupt bronchitis), pneumonia on one occasion, and exacerbations (temporary reversible worsenings) of COPD." The doctor also noted while Mr. Tyler had other conditions reported by the doctors in their records, these were not the focus of treatment with exceptions of some medications given for heart failure. "Mr. Tyler's central problem was a form of asthma or COPD. Please note, the term COPD stands for chronic

obstructive pulmonary disease and is a broad term designed to include chronic and frequently recurring asthma, emphysema, chronic bronchitis, or any combination of those conditions...." DX 30.

This court finds Dr. Branscomb's medical assessment provides substantial evidence that Mr. Tyler's COPD, acute bronchitis and asthmatic attacks caused a health condition which his physician found required emergency hospitalization and inpatient treatment. Close study of each hospitalization record discloses the severity of Tyler's pulmonary problem and the necessity for inpatient hospital care provided at each admission. The existence of an emergency condition is necessarily a medical determination. This court finds sufficient evidence is established by Dr. Branscomb's analyses and by the respective hospitalization and treatment reports that Mr. Tyler's condition required immediate hospitalization for necessary medical treatment of his pulmonary impairment.

Accordingly this court finds Mr. Tyler's hospitalizations and bills for professional services and medications provided during the period May 12, 1979 through January 16, 1989 are compensable and reimbursable to the extent that they are related to the treatment of legal pneumoconiosis. I find Dr. Leon Cander's report, DX 31 (consisting of 12 pages) provides the court, and the parties, with a detailed evaluation of compensable and reimbursable medical treatment and hospitalizations, as the doctor also lists specifically all treatments and medical expenses which do not relate to treatment for or because of legal pneumoconiosis and are not reimbursable.

I find Dr. Sander J. Levinson provides a general recognition of reimbursable medical treatment expenses, bills for services and medications which were rendered directly for Mr. Tyler's lung condition or aggravation of this lung condition. He felt that the chronic exposure to occupational inhalation of coal mine dust must be considered a substantial contributing factor to Mr. Tyler's condition. Dr. Levinson noted certain exceptions which he specified were not reimbursable. It appeared to Dr. Levinson "that the entire threat of treatment has been directed towards periodic exacerbations of his [Tyler's] chronic (sic) obstructive pulmonary disease and that the physician examinations and medications prescribed were for direct treatment of this chronic obstructive pulmonary disease." Dr. Levinson noted that since it has been previously adjudged that Mr. Tyler does have a chronic lung disease caused in substantial part by coal mine dust exposure" it would seem apparent to [him] that these charges be covered under the Federal Black Lung Program. I find Dr. Levinson's opinion supports this court's finding the medical expenses are reimbursable to the

extent they relate to treatment of legal pneumoconiosis as discussed supra.

F

Whether the case must be remanded to the District Director.

The Benefits Review Board has instructed that, on remand, should I find that claimant is entitled to reimbursement of a physician's charges but that the required reports of first treatment were not filed, the case must be remanded to the district director to determine if such a failure should be excused under the terms of Section 907(d)(2) of the Longshore Act and Section 725.706(a) of the regulations.

As discussed supra, this court finds the medical treatment of Mr. Tyler by his treating physician and the physicians' service charges were and are reimbursable except for such treatments as Dr. Cander specified did not relate to treatment of Mr. Tyler's legal pneumoconiosis. The record contains no evidence that Mr. Tyler's treatment physicians furnished a report of first treatment to the Department of Labor and employer. This failure to provide employer with first treatment reports raises the issue whether such omission to file the report was excusable.

The Director contends the Board's reliance on **Toyer v. Bethlehem Steel Corp.**, 28 BRBS 347 (1994) (McGranery J. dissenting), a Longshore Harbor Workers Compensation Act (LHWCA) case, was misplaced because **Toyer** involved amendments to the Longshore Act and its regulations that do not apply to the Black Lung Benefits Act claims. Hence while the Director acknowledges the Board's mandate that this case be remanded as set forth above, the Director disagrees with the Board's Order and further believes that remanding this case will result in further delays in resolution of this case. Director Brief at 6-7.

Employer asserts Director misreads **Toyer** and the Board correctly held that only the district director has jurisdiction to excuse the failure to provide first treatment notes.

In ordering this case be remanded to the district director, the Board agreed with employer that this court erred in finding that it was in the interest of justice to excuse the failure of the treating physicians or facilities to provide employer with reports of claimant's first treatment. The Board referred to Section 907(d)(2) of the Longshore Act which provides that an employer is not liable for medical expenses unless within 10 days following the first treatment, the physician rendering such treatment provides

the employer with a report of that treatment. 33 U.S.C. § 907(d)(2). The Secretary may excuse the failure to comply with the provisions of this section in the interest of justice. 33 U.S.C. § 907(d)(2), 20 C.F.R. § 702.422. Thus the Board had held in **Toyer, supra**, that the district director, not the administrative law judge, has the authority to determine whether non-compliance with Section 7(d)(2) should be excused.

The Board also noted Section 725.706(a) of the black lung regulations requires the treating physician to furnish the Department of Labor and the responsible operator a report of first treatment within 30 days following the first medical or surgical treatment. 20 C.F.R. § 725.206(a). Section 725.706(b) further provides that in addition to the reports required by paragraph (a) the treating physician, facility, employer or carrier shall provide such reports that the Department of Labor may from time to time require. Within the discretion of the district director, payment may be refused to any medical provider who fails to submit any report required by this section. 20 C.F.R. § 725.706(b).

Thus the Board concluded, on remand, should the administrative law judge find that claimant is entitled to reimbursement of a physician's charges that the required reports of first treatment were not filed, the case must be remanded to the district director to determine if such a failure should be excused under the terms of Section 7(d)(2) of the Act and Section 725.706(a) of the regulations.

This court having found that claimant is entitled to reimbursement of his physicians charges but that the required reports of first treatment were not filed, it is so ordered that the case be remanded to the district director.

DECISION AND ORDER OF REMAND

Having further considered the issues directed by the Benefits Review Board's Decision and Order issued January 18, 2001, it is ordered and this court has decided:

1. Claimant James Tyler and/or the Trust Fund are entitled to be reimbursed for all payments of medical expenses made to claimant's physicians and to providers of medical treatments.

2. Such reimbursement to claimant and the Trust Fund shall be made only for services and treatment which related to the treatment of Mr. Tyler's legal pneumoconiosis, as provided by the Black Lung Act and regulations. For itemization of reimbursable bills and expenses see report of Dr. Cander. DX 31.

3. It is ordered that the case be remanded to the district director for further appropriate action consistent with this court's decision and as directed by the Benefits Review Board.

A
CLEMENT J. KICHUK
Administrative Law Judge

Boston, Massachusetts
CJK:dr

NOTICE OF APPEAL RIGHTS

Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Order may appeal it to the Benefits Review Board within thirty (30) days from the date of this order, by filing a Notice of Appeal with the Benefits Review Board; U.S. Department of Labor; Room S-5220, FPB; 200 Constitution Avenue, N.W., Washington, DC 20210; ATTN: Clerk of the Board. A copy of this Notice of Appeal must also be served on Donald S. Shire, Esq.; Associate Solicitor for Black Lung Benefits; U.S. Department of Labor; Room N-2117, FPB; 200 Constitution Avenue, N.W.; Washington, DC 20210.